

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)
)
)
Plaintiff,)
)
)
v.) **Case No. 05-cv-329-GKF(SAJ)**
)
TYSON FOODS, INC., et al.,)
)
)
Defendants.)

**STATE OF OKLAHOMA'S MOTION FOR
LEAVE TO SERVE REBUTTAL EXPERT REPORTS**

Plaintiff, the State of Oklahoma ("the State"), respectfully moves this Court for leave to serve rebuttal expert reports to rebut certain opinions contained in the expert reports of the following of Defendants' experts: Dr. Samuel Myoda, Dr. Ron L. Jarman, and Dr. Billy Clay¹

I. Introduction

This past May the State produced 15 expert reports to Defendants. On December 1, 2008, Defendants disclosed the expert reports of thirteen experts. Within these expert reports are a number of opinions on subject matters not directly addressed by the State's experts in their respective expert reports or which are based on methods or data which the State has a right to rebut. In the event the Court allows Defendants to introduce evidence on these new subject matters, methods, or data at trial, the State would desire and is entitled to introduce rebuttal evidence via expert witnesses to rebut such evidence.

While the State will rebut other aspects of the defense case in its direct evidence (including expert opinion, lay fact testimony, documents, or otherwise) or in cross examination,

¹ The State has attempted to confer with counsel for Defendants but, because of the holiday, Defendants' counsel has been unable to advise if Defendants agree or disagree to the relief sought herein.

in the spirit of full disclosure in the discovery process, the State is seeking leave to file rebuttal expert reports to rebut certain opinions of the expert reports of the following of Defendants' experts: Drs. Myoda, Jarman, and Clay.² The State seeks leave to file the rebuttal expert report regarding Dr. Myoda thirty days after receiving (1) data requested of Defendants on December 19, 2008 and, (2) split samples of all samples taken by Defendants regarding Dr. Myoda's PCR analysis. The State seeks leave to file rebuttal reports regarding Drs. Jarman and Clay fourteen days after entry of an order granting leave to file such reports. This will provide plenty of time for Defendants to review these rebuttal expert reports and to conduct discovery about these rebuttal opinions prior to the start of trial.

II. Areas for which rebuttal expert reports are sought

As noted above, Defendants disclosed thirteen expert witnesses on December 1, 2008. The State has diligently reviewed the reports of these thirteen expert witnesses. The State is not seeking leave to disclose a rebuttal expert report as to each of these expert witnesses. Rather, the State has been extremely judicious in selecting the areas for which rebuttal expert reports are sought. They are as follows:

A. Report of Dr. Samuel Myoda

Dr. Myoda's expert report contains PCR analyses of the State's environmental samples and Defendants' environmental samples which are based on methods or data which the State has a right to rebut. The requested rebuttal expert report would explain, repel, contradict, and/or disprove Dr. Myoda's PCR analyses.

² Defendants are required to disclose additional expert reports in January, 2009. Depending on the content of these new reports, the State may seek leave to file one or more rebuttal expert reports, and the State reserves all rights to do so. Moreover, nothing in this motion is intended to otherwise circumscribe the State's right to offer other rebuttal evidence at trial.

B. Report of Dr. Ron L. Jarman

Dr. Jarman's expert report contains analyses of phosphorus and fecal coliform loadings from point sources, overflows, biosolids and human populations which are based on methods or data which the State has a right to rebut. The requested rebuttal expert report would explain, repel, contradict, and/or disprove Dr. Jarman's loading analyses.

C. Report of Dr. Billy Clay

Dr. Clay's expert report contains analyses of the relative contribution of phosphorus and bacteria of cattle and poultry waste which are based on methods or data which the State has a right to rebut. The requested rebuttal expert report would explain, repel, contradict, and/or disprove Dr. Clay's analyses.

III. Argument

Without the benefit of any substantive argument on the issue, Magistrate Judge Joyner stated in his October 28, 2008 Opinion and Order, DKT # 1787, that "[t]here is no provision in the scheduling order for rebuttal expert reports by either side so none should be expected." However, "fundamental fairness requires that a party be permitted to introduce evidence to rebut inferences the jury can draw from the opposing party's evidence. The right of a party to present evidence to refute evidence of the other side is a matter of right, the denial of which is an error of law." 88 C.J.S. *Trial* § 195. "Rebuttal evidence may be introduced to explain, repel, contradict, or disprove an adversary's proof." *United States v. Kelley*, 187 Fed. Appx. 876, 888 (10th Cir. 2006). "When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible. Permissible does not mean mandatory, however; the decision to admit or exclude rebuttal testimony remains within the trial court's sound discretion." *Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir. 2005) (citation omitted). In the context of expert opinion, it

necessary follows that the Court's task of exercising its discretion as to whether to allow rebuttal expert opinion evidence at trial would be greatly facilitated by having rebuttal expert reports to review. Moreover, Defendants' trial preparation would be aided by having advance notice of the scope of the State's intended rebuttal evidence by means of expert rebuttal reports. Accordingly, the State is now respectfully requesting leave to serve a limited number of rebuttal expert reports on a limited number of issues.

This request by the State is narrowly focused. The State has not asked for leave to serve rebuttal expert reports as to each and every one of Defendants' experts. It has carefully studied the expert reports it has received to date and exercised great restraint in order to minimize the number of rebuttal expert reports it is requesting. Granting leave to file these three rebuttal reports on the schedule proposed will give Defendants ample time before trial to familiarize themselves with these rebuttal reports. Finally, the important goals of fundamental fairness and full development of the factual record will be served by granting the State's request.

IV. Conclusion

WHEREFORE, for the reasons stated above, the Court should grant the State leave to serve the requested rebuttal expert reports.

Respectfully Submitted,

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